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SERVICE DATE - FEBRUARY 20, 1998

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41648

SWIFT-ECKRICH, INC.
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

Decided: February 17, 1998

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, in *J.H. Ware Trucking, Inc., Debtor v. Swift-Eckrich, Inc.*, Adv. No. 93-4323. The court proceeding was instituted by The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent), a former motor common and contract carrier,[2] to collect undercharges from Swift-Eckrich, Inc. (Swift-Eckrich or petitioner). Ware seeks undercharges of $10,904.82, plus interest, allegedly due, in addition to amounts previously paid, for services

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

[2] On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

rendered in transporting 48 shipments of refrigerated meat products between April 7, 1989, and November 12, 1990. By order dated October 13, 1995, the Bankruptcy Court stayed the proceeding and directed petitioner to seek a determination from the ICC as to whether the shipments in issue were transported in contract or common carriage.[3]

Pursuant to the court order, Swift-Eckrich, on October 25, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage and unreasonable practice. By decision served November 3, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. On November 29, 1995, Ware filed an answer to the Swift-Eckrich petition. On January 2, 1996, Swift-Eckrich filed its opening statement. Ware filed a reply argument on August 9, 1996, and Swift-Eckrich filed its rebuttal on August 27, 1996.

Petitioner contends that the shipments at issue were transported by Ware as a contract carrier pursuant to the terms of a written an agreement entered into by the parties on April 27, 1987. Petitioner further asserts that Ware's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 2(e) of the NRA.

Swift-Eckrich supports its argument with a verified statement from Don Fennelly, petitioner's Corporate Transportation Manager. Attached to Mr. Fennelly's verified statement is a copy of an agreement signed by representatives of Ware and Swift-Eckrich bearing an effective date of April 27, 1987; various rate schedules related to the agreement; and a letter dated August 11, 1989, from Ware's Sales Manager to Swift-Eckrich that references a revised schedule of rates (Exhibit A).[4] Also attached to Mr. Fennelly's verified statement are statement of claim forms that list each of the subject shipments, the charge originally assessed and paid for each

[3] Certain of the pleadings submitted in this proceeding contain some confusing references to the United States District Court for the Eastern District of Missouri (U.S. District Court). The record indicates that the court order referred to in the body of this decision was issued by the Bankruptcy Court pursuant to an appellate ruling issued by the U.S. District Court.

[4] The agreement is entitled "MOTOR CARRIER TRUCKING AGREEMENT BETWEEN SWIFT-ECKRICH, INC. AND J.H. WARE TRUCKING, INC."

shipment, the total shipment charge sought in the Ware undercharge claim, and the asserted balance due for the shipment (Exhibit B). Mr. Fennelly asserts that all of the subject shipments were transported pursuant to the agreement, that Swift-Eckrich relied upon the agreement in tendering its traffic to Ware, that Ware consistently invoiced Swift-Eckrich in accordance with the terms of the agreement, and that each of the Ware invoices was paid by Swift-Eckrich, which payment was accepted by Ware as payment in full without objection.

Respondent does not dispute the facts asserted by petitioner but maintains that the service provided in transporting the shipments at issue was that of a common carrier. Respondent further contends there is no proof that Ware offered a particular rate to Swift-Eckrich, no evidence to support Swift-Eckrich's assertion of reliance and, therefore, no basis for asserting a claim of an "unreasonable practice."

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issue raised.

At the outset, we recognize that the court referred the issue of common/contract carriage for our consideration, and that petitioner in its defense focused primarily on the common/contract carriage issue. Nevertheless, the Board's use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, it may choose to decide cases on other grounds within its jurisdiction, *Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking*, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) of the NRA here. *The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc.*, No. MC-C-30156 (ICC served Apr. 20, 1994); and *Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee Of The Bankruptcy Estate of Total Transportation, Inc.*, No. 40640 (ICC served Feb. 7, 1995).

With the question of NRA's applicability now beyond doubt, the Board has acted to use section 2(e) to more readily dispose of undercharge cases on its docket, even in those cases where, as here, the primary regulatory defense raised by the shipper against the undercharge claim has been contract carriage. *E.g., Chiquita Brands, Inc.--Pet. for Decl. Order--Olympic Express, Inc.*, No. 41032 (STB served Oct. 22, 1996) and *Southware Company et al.--Pet. for Decl. Order--Jones Truck Lines, Inc.*, No. 41543 (STB served Aug. 7, 1996). As illustrated by these cases, that has occurred because, in most instances, a contract establishes "written evidence" that the parties intended a negotiated, unfiled rate to supplant the filed tariff rate that a

nonoperating carrier such as Ware now retroactively seeks to enforce, and for which the NRA, through section 2(e), provides a complete defense. Thus, while the petitioner relied principally on a contract carriage defense, our use of section 2(e), rather than a common/contract determination, to resolve this proceeding is fully consistent with our present approach in all of the court-referred undercharge cases on our docket.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."

It is undisputed that Ware is no longer an operating carrier.[5] Accordingly, we may proceed to determine whether Ware's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a 1987 motor transportation agreement between Ware and Swift-Eckrich, as well as an August 11, 1989 letter from Ware's Sales Manager to petitioner, that clearly reference the existence of negotiated rates. In addition, petitioner has submitted statement of claim forms that indicate that the rates originally assessed by respondent were consistently and substantially lower than those Ware is here attempting to collect. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best,* 10 I.C.C.2d 235 (1994). *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.,* C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the

[5] Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the rates originally billed by Ware and paid by Swift-Eckrich were rates agreed to in negotiations between Swift-Eckrich and Ware. The 1987 transportation agreement, the various rate schedules attached to the agreement, and the 1989 letter from Ware to petitioner confirm the testimony of Mr. Fennelly and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the unrebutted evidence establishes that negotiated rates were offered to Swift-Eckrich by Ware; that Swift-Eckrich reasonably relied on the offered rates in tendering its traffic to Ware; that the negotiated rates were billed and collected by Ware; and that Ware now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Ware to attempt to collect undercharges from Swift-Eckrich for transporting the shipments at issue in this proceeding.

This is action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable Barry S. Schermer
United States Bankruptcy Court
for the Eastern District of Missouri
One Metropolitan Square
7th Floor, 211 North Broadway
St. Louis, MO 63102-2743

Re: Adv. No. 93-4323

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary